1967

State of Utah v. Raymond Dodge : Brief of Respondent

In The Supreme C
of the State of

THE STATE OF UTAH,
Plaintiff,

- vs. -

RAYMOND DODGE,
Defendant.

BRIEF OF

Appeal from the
Judicial Di
Honorable

RAYMOND DODGE
Box 250, Draper, Utah
Appellant

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In The Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff-Respondent,
- vs. -
RAYMOND DODGE,
Defendant-Appellant.

Case No. 10771

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Raymond Dodge, appeals from a conviction of the crime of first degree perjury on jury trial in the Second Judicial District Court, Weber County, State of Utah.

DISPOSITION IN LOWER COURT

The appellant was charged by information with the crime of first degree perjury. A jury trial was held September 28 and 29, 1966. The jury returned a verdict of guilty as charged, and the Honorable Charles G. Cowley imposed sentence upon the appellant of confinement in the state prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Second District Court should be affirmed.

STATEMENT OF FACTS

The respondent fundamentally agrees with the statement of facts submitted in the appellant's brief, but offers the following as a more detailed and accurate statement of evidence as received at trial during the presentation of the state's case.

Mr. Cecil Tucker, an official court reporter, testified that on the 10th day of December 1965 he had occasion to report the testimony of a habeas corpus proceeding brought by Tommy Danks against Warden John Turner (T-11). During this hearing the appellant, after being sworn (T-12), testified on behalf of Tommy Danks. Appellant when asked if he had seen Bill Newbold during the month of March, 1965, in a tavern on 25th Street, stated Bill Newbold had been pointed out to him. Further that Bill Newbold, during a conversation, explained to appellant that in order to avoid difficulty with his wife he (Newbold) had falsely accused Tommy Danks of the crime of robbery (T-23). The appellant had likewise testified the date of the meeting in the 25th Street tavern was either the 18th or 19th of March, 1965 (T-25).

Bill Newbold testified that he could not recall having seen the appellant prior to the habeas corpus hearing in December 1965 (T-26). On the 10th of

March, 1965, he was admitted to an Ogden hospital for a double hernia operation (T-26). As a result of the operation, and subsequent complications, Newbold stated he did not leave either the hospital or his home from March 10th to March 18th, 1965 (T-27). During the period of time between March 14, 1965, and April 25, 1965, Newbold did not go to 25th Street for any reason (T-40).

Doctor Keith Stratford testified he performed surgery upon Bill Newbold on the 11th of March, 1965 (T-30). The doctor stated infection developed in the incision complicating Newbold's post-operative recovery (T-31). It was further testified by the doctor that Newbold did not appear capable of going anywhere but home when he examined him on March 19, 1965.

Mrs. Lorraine Newbold testified that from March 14, 1965, until April 22, 1965, her husband, Bill Newbold, did not leave their home except to visit the office of Doctor Stratford (T-71).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN FAILING TO INSTRUCT THE JURY REGARDING THE LESSER INCLUDED OFFENSE OF SECOND DEGREE PERJURY BECAUSE APPROPRIATE INSTRUCTIONS WERE NOT REQUESTED.

The record does not disclose any request to the trial court on the part of appellant to submit the issue of perjury in the second degree to the jury.

Absent such timely and appropriate request, appellant may not complain of the court's failure to give such instructions. The respondent concedes perjury in the second degree is an included offense in the charge of perjury in the first degree. **State v. Hutchinson,** 4 Utah 2d 404, 295 P.2d 345 (1956).

This court addressing the issue in **State v. Sullivan,** 73 Utah 582, 276 Pac. 166 (1929) said:

> Before the defendant can be heard to complain because trial court did not instruct upon the law of lesser offenses included within the crime charged such defendant must have requested instructions upon the included offense or offenses. (citing numerous cases).

Justice Larsen observed in **State v. DuBois,** 98 Utah 234, 98 P.2d 354 (1940):

> Having approved the instructions as given and requested no others, counsel should not be heard to complain that the court did not constitute itself counsel in the cause, and submit other theories not urged by defendant just because the court may think such theories of defense could have been urged. It is the court's duty to try the issues made by the parties and not make cases for them. We have held that where instructions are palpably erroneous to such an extent that they would, if followed by the jury prevent a fair and proper determination of the issues, we may notice the error without exception being taken. State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936); State v. Waid, 92 Utah 297, 67 P.2d 647 (1937). **But we are aware of no holding that the mere failure to give an instruction which might have**

> **been given but which was not requested or called to the attention of the court, and no exception taken to the failure to be given will be noticed on appeal.** (Emphasis added.)

The respondent submits that the failure to give an instruction on the included offense on perjury in the second degree falls under the general rule of the **DuBois** case, and is not within the exception of the **Cobo** case.

The appellant in his brief does not define or particularize the basis upon which he feels there was an evidentiary basis for an instruction on the law of perjury in the second degree. Therefore, taking the evidence as most favorable to the trial court's ruling, it appears there is no factual basis for the publication of such an instruction. Authorities are in accord with this principle. 53 Am. Jur. **Trial** § 798 (1945) states in part:

> **Where, under the evidence the defendant must be either guilty of the crime charged or not guilty of any, the general rule is that the court is not required, and may refuse, to instruct the jury as to include offenses or inferior degrees thereof.**

Accord: **State v. Angle,** 61 Utah 432, 215 Pac. 531 (1923); **State v. Thorne,** 41 Utah 414, 126 Pac. 286 (1912).

The respondent submits, therefore, that the appellant was not entitled to an instruction on a lesser included offense.

POINT II

THE APPELLANT DOES NOT RAISE ISSUES COGNIZABLE BY THIS COURT IN POINTS 2 AND 3 OF HIS BRIEF.

The appellant on page 5 of his brief simply states a failure on the part of the State to prove beyond a reasonable doubt the joint union of act and intent. Appellant fails to elaborate or point out wherein the evidence is insufficient. On page 7 of his brief appellant argues the incompetency of his counsel at trial. Likewise, he fails to cite the record in support of his allegations and conclusions stated in the argument supporting point 3 of appellant's brief. It is respondent's position that issues presented by brief in this manner are not appropriate for review by this court. **Lepasiotes v. Dinsdale,** 121 Utah 359, 242 P.2d 297 (1952); **In Re Levelles Estate,** 122 Utah 253, 248 P.2d 372 (1952).

POINT III

THE TRIAL COURT DID NOT ERR IN IMPOSING A SENTENCE WHICH WOULD BE CONSECUTIVE TO A TERM PROVIDING FOR A MAXIMUM OF LIFE IN PRISONMENT.

Judge Charles G. Cowley of the Second Judicial District, after receiving a verdict of guilty from the jury, sentenced the appellant to serve a term of not less than one nor more than five years in the Utah State Prison (T-164). This sentence was to run consecutively with a fifteen year to life indeterminate term being served by the appellant at the time the

perjury offense was committed (T-161-162). Under Utah statutes a person having been deemed to be an habitual criminal shall be punished by imprisonment in the state prison for not less than fifteen years. (Utah Code Ann. § 76-1-18 (1953)). Assuming arguendo, that appellant correctly regards a sentence under this above statute as being one for a maximum of life imprisonment his argument must of necessity fail. The sentencing judge, as required by law, correctly imposed judgment in making the sentences consecutive. Utah Code Ann. § 76-1-33 (1953).

If respondent correctly understands appellant's argument, appellant argues once a defendant is sentenced to life imprisonment he is immune from punishment for further crime unless that crime is one for which the sentence of death is imposed. The state suffers from no such disability, and the contention has no foundation in law or reason. This court, considering circumstances analogous to the instant case in **McCoy v. Severson,** 118 Utah 502, 222 P.2d 1058 (1950) stated:

> **A realistic approach to the problem suggests that neither a sentence for life nor a sentence from five years to life means that a defendant will serve his natural life in prison. There would have been no occasion to permit the termination of commutation if the Legislature intended that the terms could not be made less. For all practical purposes, a sentence for life must be considered in connection with the powers of the Board to commute the sentence to a fixed and shorter period. With this background, the**

> Legislature, when it considered the statutes dealing with consecutive sentences, amended one section as late as 1917 and never expected life sentences from its provisions. It must have intended to permit the courts the right to sentence a defendant to serve a period consecutive to the time his life sentence might be terminated. Certainly the board of pardons has so interpreted the Legislative intent for many years.

It should be noted that although the statutes controlling commutation of sentence or the granting of pardons at the time of **McCoy** decision (Utah Code Ann. § 67-0-1 (1943)) were repealled the substance of that statute was reenacted into its present form. Utah Code Ann. § 77-62-3 (1953).

Similarly, in **People v. Hayes,** 9 Cal. App. 2d 157, 49 P.2d 288 (1935), the California District Court of Appeals, dealing with facts similar to the instant case, stated:

> The fact that a prisoner who serve a life term, and while serving such, dies in prison cannot serve other sentences imposed for other offenses and running consecutively does not prevent, as a matter of law the imposing of such consecutive sentences, even though . . . the additional penalty cannot be imposed, i.e., actually inflicted upon such life termer. It might also be mentioned, that even where a prisoner is serving a life sentence this does not mean that he will remain in prison until he dies. Parole, commutation, or pardon may release him from prison long before his term of life ends.

The respondent submits, that the subsequent consecutive sentence is not only permissible under

the circumstances of the instant case, but necessary for proper judicial administration.

CONCLUSION

Appellant's contentions on appeal are totally without merit. No basis exists for reversal. Therefore, respondent submits the conviction be affirmed.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

GERALD G. GUNDRY
Assistant Attorney General
Attorneys for Respondent